Circo Group, LLC d/b/a Circo Bar *and* Central General De Trabajadores.[1] Case 12–RC–123841

April 24, 2015

DECISION AND DIRECTION

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in an election held April 10, 2014, and the hearing officer's report recommending disposition of it. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 6 for and 6 against the Union, with 2 challenged ballots, a number sufficient to affect the results.

The Board has reviewed the record in light of the exceptions[2] and brief and has adopted the hearing officer's findings and recommendations only to the extent consistent with this Decision and Direction.

The hearing officer recommended sustaining the Union's challenge to the ballot of employee Juan Brand. Contrary to the hearing officer, and for the reasons set forth below, we find that the Union failed to satisfy its burden of proving that Brand was ineligible to vote. Therefore, we reverse the hearing officer and overrule the Union's challenge to Brand's ballot.

The stipulated unit includes "[a]ll part-time and regular full-time bartenders and barbacks who work at the Employer's nightclub in Santurce, Puerto Rico." The hearing officer found that Brand worked as a barback during the eligibility period. The record contains evidence of Brand's employment contract, his tax and I-9 forms, his receipt of an employee handbook, two paychecks that he received for work performed during the eligibility period, and work schedules covering the eligibility period.[3] The hearing officer stated that, based on the paychecks and work schedules, it appeared "more probable than not that Brand worked for the employer sporadically, with no established pattern of regular continuing employment," citing *Piggly Wiggly El Dorado Co.*, 154 NLRB 445, 451 (1965), and *G.C. Murphy Co.*, 128 NLRB 908 (1960).

The applicable test, however, is not whether Brand worked "sporadically, with no established pattern of regular continuing employment," but whether he was eligible to vote as a regular part-time employee under *Davison-Paxon Co.*, 185 NLRB 21 (1970). In *Davison-Paxon*, the Board held that, to qualify as a regular part-time employee, an employee must average at least 4 hours of bargaining-unit work per week during the quarter preceding the election eligibility date. When an employee is hired during that quarter, the Board considers whether the employee averaged 4 hours of bargaining-unit work during the weeks in which he was employed. See *Modern Food Market*, 246 NLRB 884, 884–885 (1979). Here, Brand was hired during the quarter preceding the eligibility date. Thus, to be eligible to vote as a regular part-time employee, Brand must have averaged at least 4 hours of bargaining-unit work per week from the date of his hire through the remainder of the quarter preceding the eligibility date.

Based on the record before us, it is impossible to determine whether Brand worked the requisite number of hours under *Davison-Paxon* to be eligible to vote. The two paychecks that he received during the eligibility period do not specify the number of hours that he worked, and nothing in the record clarifies that question.[4]

The burden of proof, however, rests on the party that challenges an employee's eligibility to vote—here, the Union. See, e.g., *Sweetener Supply Corp.*, 349 NLRB 1122, 1122 (2007); *Golden Fan Inn*, 281 NLRB 226, 230 fn. 24 (1986). We find that the Union did not satisfy its burden of proof because it failed to present evidence establishing that Brand was ineligible to vote.[5] Therefore, we reverse the hearing officer and overrule the Union's challenge to Brand's ballot.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 12 shall, within 14 days from the date of this Decision and Direction, open and count the ballots of Juan Brand

[1] In his report, the hearing officer inadvertently refers to the Union as Union General de Trabajadores. This caption corrects the error.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the challenge to the ballot of employee Edwin Velez.

[3] Brand's name does not appear on these work schedules. However, the Employer's executive director testified that the Employer does not list on-call barbacks, such as Brand, on its schedules.

[4] Brand's employment contract states that his base pay rate was $2.13 per hour, but if Brand did not receive the federal minimum wage of $7.25 per hour through base pay plus tips, the Employer would pay the difference. The record evidence does not disclose Brand's tip income, if any, and we cannot determine whether the paychecks he received during the eligibility period reflect the base pay rate, the federal minimum wage, or something in between.

[5] The Union could have subpoenaed documents in the Employer's possession pursuant to Sec. 102.66(c) of the Board's Rules and Regulations, but did not do so.

and Edwin Velez. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. April 24, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Mark Gaston Pearce, Chairman (SEAL) NATIONAL LABOR RELATIONS BOARD